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No. 91-1738

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

—v.—

KEVIN TAYLOR,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the Seventh Circuit correctly reject the argument that a "new rule" of constitutional law is necessary to hold that a habeas petitioner is in custody in violation of due process, when:

(a) state law barred a conviction for murder if the accused demonstrated sufficient passion and provocation to justify, instead, a conviction for manslaughter;

(b) the state trial judge found the accused's evidence of passion and provocation sufficient to require a jury instruction on manslaughter; and

(c) the judge then gave instructions that the state concedes may have led the jury to believe that it should convict the accused of murder even if it was persuaded that he had established the elements of manslaughter?

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Illinois is one of its statewide affiliates.

Both the ACLU and its affiliates have long supported the view that the habeas corpus authority of the federal courts is an important constitutional safeguard that enhances the concept of federalism. As that authority has come under attack in recent years, the ACLU has participated in numerous habeas cases before this Court.

In this particular case, the parties have focused on the particular due process claim raised by the respondent and whether the legal principles on which that claim rests were established when the respondent's conviction and sentence became final. This brief concentrates, more generally, on the definition of "new rules" underlying petitioner's argument and the implications of accepting that definition for this Court's approach to "retroactivity."

STATEMENT OF THE CASE

Kevin Taylor, the respondent before this Court, seeks federal habeas corpus relief on the ground that he is in custody in violation of federal law. He contends that the murder conviction on which his custody is based was obtained by violating his right to due process at trial in state court.

Under the law of Illinois, Taylor could be convicted only of manslaughter if: (1) the prosecution established

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

the elements of murder; but (2) Taylor established that he acted on a "sudden passion" brought on by "serious provocation." At trial, Taylor took the witness stand and gave evidence tending to show the necessary passion and provocation. The trial judge found Taylor's testimony sufficient under state law to command a jury instruction on manslaughter. However, the judge's actual instructions to the jury included a statement that the jury should convict Taylor of murder if it concluded that the prosecution had met its burden with respect to that offense.

Those instructions, the state now concedes, may have led the jury to believe that it should return a murder verdict even if it was convinced that Taylor had acted on passion and provocation warranting only a manslaughter conviction. Petitioner's Brief at 19-20. Taylor claims, accordingly, that the instructions given in this case effectively took the passion and provocation issues away from the jury. Specifically, Taylor claims that once the State of Illinois made passion and provocation decisive, and once the trial judge concluded that Taylor had adduced evidence that would allow the jury to find for him on those issues, the judge denied him due process by effectively preventing the jury from considering those very questions.

Petitioner Gilmore's response is that, however meritorious Taylor's due process claim may be, it cannot be considered in habeas corpus in light of *Teague v. Lane*, 489 U.S. 288 (1989), and other recent cases, holding that the federal habeas courts are barred in most instances from applying "new rules" of law. Relying specifically on a phrase from *Butler v. McKellar*, 494 U.S. 407 (1990), Gilmore contends that Taylor's due process claim demands the creation of "new" law because, at the time his conviction became final, the proper result with respect to that claim on the facts of this case was "susceptible to debate among reasonable minds." *Id.* at 415. After a careful review of this Court's decisions, the Seventh Circuit disagreed and issued a writ of habeas corpus.

SUMMARY OF ARGUMENT

This case is still another in an increasingly long series of cases in which this Court has been invited to dismantle, by indirection, the federal courts' statutory jurisdiction to determine whether state convicts are in custody in violation of federal law.[2] Here again, the matter at stake is clear: whether state convicts will continue to be entitled to meaningful access to the federal habeas courts for the adjudication of the merits of properly preserved claims.

Gilmore does not suggest that the Court should discard the federal courts' habeas jurisdiction forthrightly. Nor could he. Congress has the authority to prescribe the lower federal courts' jurisdiction in federal question cases. And in the Habeas Corpus Act of 1867, as amended, 28 U.S.C. §§2241-2255, Congress has plainly conferred on those courts the power and responsibility to receive applications from state prisoners and to adjudicate properly presented claims *de novo*. *Brown v. Allen*, 344 U.S. 443 (1953). A forthright argument that this Court should unilaterally jettison federal habeas corpus for state convicts would run directly into the role the Constitution assigns to the legislative branch.

Coming at the issue differently, then, Gilmore asks the Court to eviscerate the writ by transparently manipulating the law of "retroactivity" in criminal cases. Inasmuch as *Teague v. Lane*, 489 U.S. 288, and its progeny ordinarily prevent the federal habeas courts from an-

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[2] *See* Briefs *Amicus Curiae* of the ACLU in *Wright v. West*, __ U.S. __, 112 S.Ct. 2482 (1992), *Withrow v. Williams*, No. 91-1030 (argued Nov. 3, 1992), and *Brecht v. Abrahamson*, No. 91-7358 (argued Dec. 1, 1992).

nouncing or applying "new rules" of constitutional law, Gilmore invites the Court to consider virtually any claim a petitioner might raise in habeas to depend on a "new rule" and thus to be barred under *Teague*.

Gilmore's means to this end is a phrase from *Butler v. McKellar*, 494 U.S. 407, in which the Court suggested that a claim was *Teague*-barred because, at the time the prisoner's conviction had become final, the merit of his claim had been "susceptible to debate among reasonable minds." *Id.* at 415. Gilmore reads this formulation in *Butler* to endorse an extraordinary definition of "new rules" for *Teague* purposes: If a previous state judgment rejecting a prisoner's federal constitutional claim was "reasonable" in light of the precedents then in existence, a federal habeas court can reach a different result only by announcing and applying an entirely "new" rule of law. Since *Teague* bars "new rules" in most circumstances, the result of Gilmore's argument is that most ordinary claims are no longer cognizable in habeas corpus, *e.g.*, claims that ask the federal courts only to apply settled legal principles to the facts of analogous cases.

Gilmore's argument is wrong for a host of reasons. In effect, he contends that a federal court must defer to a state court judgment it believes to be erroneous, but not unreasonably so. Yet a federal habeas court does not, and cannot, strike any such deferential attitude toward a previous state judgment. By contrast, a federal habeas court is charged by statute to ensure that a state prisoner is lawfully in custody and, accordingly, that the state judgment asserted to justify that custody was *correct* -- not merely plausible -- at the time it was rendered.

To perform this function, the federal court must discover and enforce the federal legal principle that this Court would have applied on direct review of the state court judgment rejecting a prisoner's federal claim. That was, by definition, the prevailing legal standard at the critical time and is thus the appropriate standard in federal habeas corpus. To the extent the *Butler* formulation for "new rules" suggests that such a legal rule is "new" and thus unavailable in federal habeas merely because a state court "reasonably" failed to recognize and respect it, the *Butler* formulation is misconceived and must be revised. Last Term, in *Wright v. West*, 112 S.Ct. 2482, this Court declined to credit the very argument that Gilmore hopes to revive in this case. The Court should take this opportunity to lay such a fundamental misconception to rest, once and for all.

Taken literally, as Gilmore proposes, the *Butler* formulation fails as a general definition of "new rules." The idea that the federal courts create new law whenever they differ with previous "reasonable" state judgments is inconsistent with the very purpose of this Court's modern approach to "retroactivity." Justice Harlan's views on retroactivity, which were adopted in *Teague*, reflect two complementary and equally important principles. First, the federal courts should not upset state court judgments on the basis of changes in the law. Second, the federal courts must enforce existing law in order to deter the state courts from neglecting or misconstruing established federal rights. If the federal habeas courts were to defer to previous state judgments they believe to have been erroneous at the time, but not *unreasonably* so, they would fail to perform the very function that *Teague* and its progeny envision for them.

In addition, the *Butler* formulation, if taken literally, would undercut the federal habeas courts' congressionally established jurisdiction to determine the merits of properly presented federal claims. The relevant provisions of the Habeas Corpus Act, as amended, were reviewed at length in our *amicus curiae* brief in *Wright v. West*. Since then, the House Judiciary Committee has advanced bills in each of the last two sessions that would have explicitly repudiated the *Butler* formulation as a definition of "new rules." In the last Congress, the full

House approved such a provision, but final congressional action was frustrated by a filibuster in the Senate.

This Court's decisions recognizing that executive officers may have a qualified official immunity from liability in civil damages actions provide no support for the *Butler* formulation of "new rules" or Gilmore's reliance on it. When this Court has held that an executive officer is shielded from liability if he or she acted in the "reasonable" belief of lawful authority, the Court has assumed, *arguendo*, that the officer violated the plaintiff's rights. That the violation was "reasonable" does not make it any less a violation; it only indicates that a particular remedy (damages) may be inappropriate.

The *Butler* formulation embraced by Gilmore, by contrast, suggests that the "reasonableness" of a state court judgment makes that judgment *correct* (for habeas corpus purposes). This is an entirely different proposition that draws nothing from the official immunity cases. To accept the literal language of the *Butler* formulation would be to allow the state's desire to keep a prisoner from obtaining habeas corpus relief to skew the content of substantive federal constitutional law.

The "bright line" definition of "new rules" proposed by the Criminal Justice Legal Foundation (CJLF), as *amicus* for petitioner, would frustrate this Court's "retroactivity" doctrine even more dramatically than the *Butler* formulation. The CJLF proposes that a federal habeas court announces or applies a "new rule" of law whenever it determines a federal claim in a way that conflicts with a previous state disposition reflecting an "established state practice." CJLF Brief at 12. That understanding of "new rules" is completely inconsistent with this Court's decisions and constitutes yet another attempt to eviscerate habeas corpus for state prisoners.

Indeed, the "established practice" proposal is foreclosed by *Penry v. Lynaugh*, 492 U.S. 302 (1989). The

CJLF's attempts to avoid *Penry* are both feeble and internally inconsistent. This Court did not overrule *Penry* simply by using the "reasonable minds" phrase in *Butler v. McKellar*. Nor can the Court simply ignore *Penry* and adopt a definition of "new rules" that sharply departs from the understanding apparent in that recent precedent.

Finally, the "established practice" proposal would compound the threat already posed by the *Butler* dictum. The CJLF argues that the federal courts should cease to ask even about the "reasonableness" of a prior state judgment and should, instead, accept an "established state practice" without examination. That idea is even more destructive to this Court's precedents than the argument that Gilmore gleans from *Butler*. Gilmore contends that the federal courts should defer to previous state judgments that were erroneous, so long as they were not *unreasonably* so. In effect, the CJLF proposes that the federal courts should defer even to *unreasonable* state judgments, so long as they were *consistently* so.

ARGUMENT

I. THE EXPANSIVE DEFINITION OF "NEW RULES" ADVANCED BY PETITIONER WOULD FRUSTRATE THE PURPOSE OF RETROACTIVITY DOCTRINE AND EVISCERATE THE FEDERAL HABEAS COURTS' STATUTORY OBLIGATION TO ENFORCE SETTLED PRINCIPLES OF CONSTITUTIONAL LAW

In *Teague v. Lane*, 489 U.S. 288, this Court drew a crisp distinction between cases that have not yet run the full course of direct review (including any *certiorari* review in this Court) and thus are not yet "final," and cases that have exhausted all avenues of direct review and thus are "final" and subject only to collateral attack (in feder-

al habeas corpus).[3] In cases in the first category, properly presented claims are adjudicated on the basis of current standards of federal constitutional law, even if those standards depart (incrementally or sharply) from prior understandings. In cases in the latter category, by contrast, claims are now adjudicated on the basis of the federal legal standards that prevailed at the time the petitioner's conviction became final. Thus, the federal habeas corpus courts are largely barred from announcing or retroactively applying "new rules" of federal constitutional law.

Teague v. Lane adopted Justice Harlan's argument that the federal habeas courts' function is to deter the state courts from neglecting prisoners' federal rights and thus to ensure that those courts "conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306, *quoting Desist v. United States*, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting). The very point of *Teague* is that the federal courts are to determine whether a petitioner's conviction "rests upon [a] *correct* application of the law in effect at the time." *Teague v. Lane*, 489 U.S. at 306-07 (emphasis added), *quoting Solem v. Stumes*, 465 U.S. 638, 653 (1984)(Powell, J., concurring in the judgment).

Justice O'Connor reiterated this point last year in *Wright v. West*:

> [W]e have [never] held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment).[4]

To accomplish its purpose, *Teague* assigns carefully considered roles to the state and federal courts. A state court's task is to determine a properly presented federal claim in the way this Court would decide it on direct review of the state court's judgment.[5] If the state court finds a claim without merit, and the prisoner raises it in federal habeas corpus later, the federal court's task is to ensure that the state court actually *did* determine the claim in the way this Court would have -- if the matter had reached this Court on direct review at that time.[6] Under *Teague*, however, the federal habeas court cannot hold the state court to any change in the law that this Court might have announced in a subsequent opinion decided after the judgment in the case at bar became final.

If the federal habeas court concludes that the state court rejected a claim that this Court would have found

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[3] *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)(explaining that a conviction judgment is "final" when the "availability of appeal [has been] exhausted, and the time for a petition for *certiorari* [has] elapsed or a petition for *certiorari* [has been] finally denied." *Accord Penry v. Lynaugh*, 492 U.S. at 314 (1989)(explaining that a prisoner's conviction had not become final until this Court denied *certiorari*).

[4] *Accord id.* at 2499 (Kennedy, J., concurring in the judgment)(stating that the federal courts are not to upset a state judgment that was "correct" at the time a petitioner's conviction became final).

[5] If this were not true, this Court would not routinely reverse state decisions found to be erroneous. Of course, this Court is no longer a court of error, and most state criminal cases are not candidates for direct review here.

[6] *Accord Desist v. United States*, 394 U.S. at 264 (Harlan, J., dissenting)(explaining that it would be "very difficult to argue" that a rule was "new" unless it could be said "with . . . assurance that this Court would have ruled differently at the time the petitioner's conviction became final").

meritorious on direct review, then the federal court can award relief without announcing or applying a "new rule." For the rule of law on which the federal court grants relief in such a case is *not* "new" at all but is, by definition, the very rule that prevailed at the time the petitioner's conviction and sentence became final.

In this case, Gilmore asks the Court to adopt an extremely expansive definition of "new rules" and, in that way, to channel a familiar claim, grounded in settled due process principles, out of the federal habeas forum on the specious ground that it can succeed only if the federal court changes the meaning of due process from what it was at the time Taylor's conviction became final. The tortured argument that must be made (and accepted) to reach such a result is an exercise in subterfuge. Put bluntly, Gilmore invites the Court to put the federal habeas courts out of business by the back door and thus to frustrate the aims of the Habeas Corpus Act.

The object Gilmore has in view is quite clear. He would eliminate a federal court's ability and duty to exercise its own, independent judgment on the merits of a prisoner's claim in light of the then-prevailing federal legal standard. Instead, he contends, the federal courts should defer to any state court decision that can be considered "reasonable" on any issue with respect to the merits (factual, legal, and "mixed"). Only in the exceptional case, in which a state court flagrantly disregards clearly established principle, should the federal courts have authority to award federal relief. *See* Petitioner's Brief at 22.

To achieve this objective, Gilmore advances the extravagant proposition that a federal habeas court creates "new" federal constitutional law whenever it reaches a result in a particular case that differs from a "reasonable" state court judgment.[7] Gilmore proposes that such a prior state court judgment fixed the baseline of then-prevailing federal law from which the departure contemplated by a "new rule" can be measured. That notion, in turn, makes a state court judgment that was merely within the bounds of reason serve, in effect, as a *correct* judgment -- as though there were no basis for demanding that the state court decide a question of federal constitutional law in the way this Court would have at the time. This argument, if adopted, would subvert the purpose served by *Teague*'s approach to retroactivity.

Gilmore insists that this Court's cases on what counts as a "new rule" have already corrupted *Teague* in the way he envisions. Grasping a phrase from *Butler v. McKellar*, Gilmore contends that a prisoner's claim in federal habeas corpus requires the application of a "new rule" any time the result for which the prisoner argues was "susceptible to debate among reasonable minds" when the state courts rejected it. 494 U.S. at 415. On this basis, Gilmore argues that any state court judgment that *was* "reasonable" is entitled to deference in federal habeas.

By Gilmore's account, the *Butler* definition of "new rules" absorbs "old rules" as well and, indeed, cases in which "old rules" are merely applied to the facts of analogous cases. Within his scheme, federal habeas corpus is now merely a figurative safety net, catching only scandalous cases in which the state courts flagrantly disregard well-established principles of constitutional law. Such a contention cannot be sustained.

This Court has never presented the "reasonable minds" formulation in *Butler* as a tidy test for "new

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[7] In a properly functioning system of law, most state court judgments will be "reasonable" in the sense that Gilmore suggests. Gilmore's proposal would, therefore, leave the federal habeas courts with virtually no role at all.

rules," to be mechanically invoked in every case. If the federal habeas courts were to accept (as close enough) state judgments that are erroneous, but not "unreasonably" so, those courts would shirk the very function that *Teague* and its progeny assign to them. They would not evaluate competing "reasonable" results and choose the one that was *most* reasonable and, therefore, the best interpretation of federal rights at the time. Instead, they would permit the state courts to pick any marginally defensible result they like and to insulate that result from federal oversight in habeas corpus. A regime of that kind would be entirely inconsistent with *Teague*. It makes no sense to define "new rules" for purposes of "retroactivity" analysis in a way that thwarts the ultimate objective that analysis seeks to achieve.

II. *BUTLER v. McKELLAR* MUST BE REVISED TO THE EXTENT IT SUGGESTS THAT THE FEDERAL HABEAS COURTS MUST DEFER TO "REASONABLE" STATE COURT JUDGMENTS AND THUS PUTS RETROACTIVITY DOCTRINE ON A COLLISION COURSE WITH THE HABEAS CORPUS ACT

If Gilmore is right and *Butler* truly suggests that a federal habeas court must forge a "new rule" of law in order to reach a conclusion different from a previous "reasonable" judgment rendered in state court, then the reasoning of *Butler* must itself be reversed. The federal habeas courts cannot, in form or in substance, simply defer to prior state judgments said to be "reasonable" in the circumstances.

Most fundamentally, the proposition that the federal habeas courts must defer to "reasonable" state court judgments flies in the face of the subject matter jurisdiction that Congress has conferred. In a long line of decisions stretching back to *Moore v. Dempsey*, 261 U.S. 86 (1923), running through *Brown v. Allen*, 344 U.S. 443,

and continued in *Miller v. Fenton*, 474 U.S. 104 (1985), this Court has consistently construed the Habeas Corpus Act to oblige the federal habeas courts to exercise independent, *de novo* judgment on the merits of prisoners' federal claims -- including, most especially, the application of settled legal standards to the facts of particular cases. *Accord Wright v. West*, 112 S.Ct. at 2488-89 (opinion for the Court by Thomas, J.).

Over the same period, Congress has both acquiesced in this Court's constructions of the Act and, in legislation enacted in 1966, codified those interpretations. We traced these developments in our *amicus curiae* brief in *Wright v. West*, and need not repeat the matter here.[8]

It is pertinent, however, to review the reception the "reasonable minds" formulation in *Butler* has had in Congress over the last two sessions. That reception has scarcely been warm. Congress has continued to resist habeas corpus "reforms" proposed by the Bush Administration, which would lead to the result suggested by the *Butler* formulation for "new rules." More affirmatively, the House of Representatives has twice passed a bill that would explicitly reject the *Butler* formulation -- for the very reason that, taken literally, it would undercut the federal courts' authority to determine ordinary claims on the merits.

In the 101st Congress, and again in the 102d Congress, the Bush Administration advocated the central feature of the "reform" program originally pressed by President Reagan -- a proposal to require the federal courts to defer to "full and fair state court adjudication"

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[8] Other *amicus* briefs in *West* also reviewed the same legislative history and drew the same conclusion: Congress has prescribed *de novo* adjudication in habeas corpus. *E.g.*, Brief for Benjamin R. Civiletti, *et al.*; Brief for Gerald Gunther, *et al.*; Brief for Senator Biden and Rep. Edwards; and Brief for the American Bar Association.

of prisoners' federal claims.[9] By all accounts, that plan would have forced the federal habeas courts to accept a previous state court judgment meeting a "minimum standard of reasonableness."[10]

In the 101st Congress, both the Senate and the House adopted omnibus anti-crime bills that included habeas corpus reforms, but omitted the "full and fair adjudication" proposal.[11] In the 102d Congress, the Senate adopted an amendment that did include a "full and fair" provision,[12] but the House squarely rejected the idea.[13]

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[9] 137 Cong. Rec. S8659 (June 26, 1991)(Richard Thornburgh to Strom Thurmond).

[10] *The Habeas Corpus Reform Act of 1982: Hearing on S.2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 95 (Apr. 1, 1982)(attachment to testimony of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy). For repetitions of this explanation of the "full and fair" plan by the Department of Justice under President Bush, *see* H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 394 n.2 (1991).

[11] 136 Cong. Rec. S6833-34 (May 23-24, 1990); 136 Cong. Rec. H8876-81 (Oct. 4, 1990).

[12] 137 Cong. Rec. S8660-61 (June 26, 1991).

[13] 137 Cong. Rec. H8005 (Oct. 17, 1991). In order to blunt opposition to the "full and fair adjudication" plan in the House, Rep. Henry Hyde offered to define "full and fair" in a revised version of the President's program he offered on the floor. Rep. Hyde proposed, *inter alia*, that a state judgment should not be considered sufficient under the "full and fair" standard if it was "contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law." 137 Cong. Rec. H7996 (Oct. 17, 1991). That definition scarcely satisfied critics of the "full and fair" plan. Rep. Hamilton Fish, the ranking minority member of the House Judiciary Committee, responded that, if that was what "full and fair" adjudication meant, then it was clearer than ever that that plan would mean the evisceration of the writ for state convicts. *Id.* at H8001. It was at that point that the full House rejected Rep. Hyde's position in favor of the provision in H.R. 3371, quoted in the text below. *See* p.16-17, *infra*.

Thus, the Bush Administration was no more successful than its predecessor in obtaining legislative assent to a rule that the federal habeas courts should defer to "reasonable" state court decisions on prisoners' federal claims. If, then, the *Butler* formulation for "new rules" were now to be read to establish such a deference rule by indirection, this Court's approach to "retroactivity" would effectively enact a radical change in the federal courts' statutory jurisdiction -- in the teeth of Congress' own repeated refusals to take such a step legislatively.

Moreover, the House of Representatives has expressly repudiated any such use of *Butler*. In the 101st Congress, the House Judiciary Committee reported a crime bill that would have added the following provision to the habeas corpus chapter of the United States Code:

> (a) Except as provided in subsection (b) of this section, each claim under this chapter shall be governed by the law existing on the date the [federal habeas] court determines the claim.
>
> (b) In determining whether to apply a new rule, the court shall consider -- (1) the purpose to be served by the new rule; (2) the extent of the reliance by law enforcement authorities on a different rule; and (3) the effect on the administration of justice of the application of the new rule.
>
> (c) For purposes of this section, the term "new rule" means a sharp break from precedent, announced by the Supreme Court of the United States, that explicitly and substantially changes the law from that governing at the time the claimant's sentence became final. *A rule is not new merely because, based on precedent existing before the rule's*

> *announcement, it was susceptible to debate among reasonable minds . . . .*

H.R. 5269, 101st Cong., 2d Sess. §1305 (1990)(emphasis added).

An accompanying committee report explained that the purpose of this provision was to ensure that "new rules" of law continue to be genuine changes in the law, *i.e.*, sharp breaks from the past, and explicitly to refute the formulation in *Butler* as a test for "new rules:"

> [T]his subsection explicitly disclaims the statement in *Butler v. McKellar*, *supra*, that a rule is new if its [*sic*] was "susceptible to debate among reasonable minds" at the time the petitioner's sentence became final. That definition is far too broad to capture only the unanticipated breaks with the past that constitute genuine "new rules."

H.R. Rep. No. 101-681, 101st Cong., 2d Sess. 126 (1990).[14] An amendment on the floor deleted this provision and, in the end, no habeas corpus reform legislation was enacted by the 101st Congress.

However, in a similar crime bill in the 102d Congress, the House Judiciary Committee offered another proposal that departed from the previous year's bill in some respects, but retained language clearly meant to repudiate any suggestion in *Butler* that the federal courts create "new rules" whenever they differ with "reasonable" results in state court:

> In an action under this chapter, the court shall not apply a new rule. For purposes of this section, the term "new rule" means a clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in State court.

H.R. 3371, 102d Cong., 1st Sess. §1104 (1991).

An accompanying report explained that the purpose of this provision was again to disclaim the "reasonable minds" line in *Butler* as a general definition of "new rules" for these purposes:

> This section clarifies the meaning of a "new rule" of law for purposes of *Teague v. Lane* and subsequent decisions, particularly *Butler v. McKellar* . . . . Certainly, the State courts are expected fairly to apply the general principles established by precedent to analogous cases . . . . *Accordingly, this section rejects the definition of a "new rule" suggested in Butler, namely that a rule is "new" if, at the time the State courts considered a petitioner's claim, the claim was susceptible to debate among reasonable minds.*

H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 129-30 (1991) (emphasis added).[15]

The House adopted this second proposal to repudiate the *Butler* formulation and included it in the House

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[14] In addition, of course, this provision would have restored pre-*Teague* standards for determining whether rules identified as "new" should be applied retroactively -- displacing the Court's blanket prohibition on retroactive application, with two narrow exceptions.

[15] This report in the 102d Congress explicitly referred readers to the language quoted above from the House Judiciary Committee's report in the 101st Congress for a fuller explanation of why the *Butler* formulation is unacceptable. *See also* H.R. Rep. No. 102-242, *supra* at 395 (dissenting views)(criticizing the Judiciary Committee bill for rejecting the *Butler* formulation).

crime bill for the 102d Congress.[16] The conference committee (appointed to reconcile the House action with that of the Senate) accepted the House language on habeas corpus. The House then adopted the conference committee report but a filibuster in the Senate, apparently fueled by opposition to weapons-control provisions and a veto threat from President Bush, frustrated final action on the report in that body.[17]

It is true that, in the end, the 102d Congress failed actually to overrule the *Butler* formulation for "new rules" by statute. Yet the import of the actions taken by the House of Representatives, and by the conference committee, is perfectly plain. But for the President's opposition and the filibuster rule in the Senate, it is extremely likely that Congress would have disapproved the *Butler* formulation explicitly.

In these circumstances, the Court would hardly show proper respect for majoritarian policymaking if it were now to take the very formulation that has ignited such opposition in the legislative branch to be the general test for "new rules" within this Court's "retroactivity" framework.

III. THE *BUTLER* FORMULATION DRAWS NO PERSUASIVE POWER FROM AN ANALOGY TO THIS COURT'S CASES ON OFFICIAL IMMUNITY IN CIVIL ACTIONS FOR DAMAGES

The suggestion in *Butler* that state court judgments on federal claims are immune from federal oversight in habeas corpus as long as they are "reasonable" bears a

[16] 137 Cong. Rec. H8005 (Oct. 17, 1991).

[17] 137 Cong. Rec. H11756 (Nov. 26, 1991); 138 Cong. Rec. S6226 (Oct. 2, 1992)(reporting a final unsuccessful cloture vote).

superficial, linguistic similarity to this Court's articulation of executive officers' official immunity from liability in civil actions for damages, so long as they could "reasonably" have believed that their actions were lawful. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). There is, however, no basis for drawing an analogy from the official immunity cases in support of the *Butler* formulation in habeas corpus. While the words the Court uses to describe the scope and content of official immunity are similar, the *reason* for using the same words in that context is fundamentally different.

In official immunity cases like *Anderson*, the Court assumes (for purposes of discussion) that the action taken by the defendant violated the plaintiff's rights. For if the defendant's behavior was lawful, there is no substantive basis for liability, and thus no need to determine whether the defendant should be immune from liability that would otherwise obtain. When, then, the Court has held that an officer is entitled to immunity if he or she acted "reasonably," it has scarcely suggested that a finding of such "reasonableness" somehow erases the unlawful behavior that triggered the immunity question in the first place. The two issues (a threshold violation of the plaintiff's rights and the defendant's immunity from a damages claim) are entirely distinguishable. They are related only in that the one (the immunity question) presupposes the other (a violation that would otherwise give rise to liability).

In the context of "retroactivity" analysis in habeas corpus, by contrast, the alleged violation of a petitioner's federal rights is not assumed at all, but rather constitutes the central matter in issue. When *Butler* suggests that the federal courts must defer to "reasonable" state court judgments, it ostensibly proposes that if the state courts did act "reasonably," they acted *correctly*. There was, then, no violation of the petitioner's rights.

Such a proposition is utterly at odds with common understandings of the judicial function. *Judicial* decisions are not correct because they are reasonable; they are reasonable only if they are correct. *See Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). In this legal system, we regret judicial error; we do not celebrate it by abandoning the pursuit of correct results and insisting that we are perfectly satisfied with judicial decisions that are close enough.

Accordingly, any attempt to support *Butler*'s "reasonable minds" formulation of "new rules" (which necessarily goes to whether a state court decision was correct at the time it was rendered) by analogy to *Anderson*'s "reasonableness" standard for qualified immunity (which posits a violation of federal rights and addresses the propriety of a damages remedy) misconceives the very point of *Butler*, *Anderson*, or both.

Nor can the *Butler* formulation of "new rules" be rescued by reconceptualizing its objective to track the purpose served by the "reasonableness" standard in *Anderson* -- namely, to shield public officials from suits for damages that visit personal liability unfairly and generate perverse incentives.

In official immunity cases, it may be unrealistic to expect executive officers in the field to be keenly aware of the nuances of the legal standards for their conduct. Particularly when those standards are constitutional in nature, and thus are often diffuse, even the most responsible officer may be hard-pressed to appreciate fully where his or her authority extends in close situations. Thus, executive officers who act on a "reasonable" belief in their authority may be entitled to the benefit of the doubt.

In the habeas context, however, state judges are expected to be fully aware of the legal standards they are charged to enforce. Moreover, they are not exposed to

any risk of suit for damages stemming from their decisions. They are called to account for their judgments only in the common and essential sense that other courts, with jurisdiction to determine the same claims on appeal or in habeas corpus, may conclude that they have reached the wrong result. That, however, is a risk that all inferior court judges engage every day, and necessarily so.[18]

There is, then, no basis for treating state judges like police officers. The justifications for insulating administrative officials from personal liability when they act unlawfully, but in the reasonable belief that they have authority, are entirely absent in the habeas corpus context, in which state courts can be, and are, expected to reach correct judgments regarding federal rights in light of the legal standards prevailing at the time of decision.

It is one thing to say that a state executive officer should not be personally liable for damages even if he or she violates a citizen's federal rights when the officer reasonably thought the action was lawful. It is quite another to say that a state court that "reasonably" misjudges a federal constitutional claim itself, and erroneously sends a citizen to prison, should be insulated from federal oversight in habeas corpus. It would be perverse in the extreme to visit the consequences of judicial error on the victim of that error.

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[18] If there is any analogy to civil suits, it is not to damage actions against government officials sued in their individual capacity, where *Anderson* applies, but to equitable actions against government defendants sued in their official capacity, where no immunity attaches. *Cf. Preiser v. Rodriguez*, 411 U.S. 475 (1973)(finding habeas corpus indistinguishable in principle from a civil action for an injunction that would reduce the duration of a petitioner's confinement); *Pulliam v. Allen*, 466 U.S. 522 (1984)(holding that neither state executive officers nor state judges are immune from civil suits to enjoin actions taken in their official capacity).

IV. THE SO-CALLED "BRIGHT LINE" DEFINITION OF "NEW RULES" PROPOSED BY THE CRIMINAL JUSTICE LEGAL FOUNDATION IS UTTERLY INCOMPATIBLE WITH THIS COURT'S RETROACTIVITY CASES

The Criminal Justice Legal Foundation, in an *amicus* brief urging reversal of the decision below, advances the astonishing argument that a federal habeas corpus court creates entirely "new" federal constitutional law whenever it reaches a result that conflicts with an "established state practice." CJLF Brief at 12.[19] Such a "bright line" definition of "new rules" for "retroactivity" purposes, *id.* at 14, would work a monumental distortion of the framework this Court has developed in *Teague* and subsequent cases.

First, the "established practice" rule is plainly precluded by *Penry v. Lynaugh*, 492 U.S. 302, in which this Court concluded that it need not announce a "new rule" in order to hold that a longstanding jury instruction in Texas violated the Eighth Amendment. *See* CJLF Brief at 26 (candidly admitting that the "established practice" test is "inconsistent with . . . *Penry*").

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[19] With respect to this case, the CJLF contends that Taylor's due process claim demands the creation of a "new rule" of law. Specifically, the CJLF insists that the Seventh Circuit erroneously concluded that its own decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), did not change the law, but merely followed precedents already on the books. We leave that argument to the parties. Suffice it to say here that neither the novelty, nor even the validity, of the holding in *Falconer* is dispositive of the question in this case. The only issue here is whether the legal standard on which Kevin Taylor now claims federal habeas corpus relief has roots in the legal standard that prevailed at the time his conviction became final. That, in turn, was the legal standard that this Court would have invoked if it had accepted *this case* on direct review at the time. Undue focus on *Falconer* or any other lower court decision only distracts from that inquiry.

The CJLF attempts to evade *Penry*, of course, but the effort is scarcely credible. Specifically, the CJLF insists that the Court need not overrule *Penry* here because the "reasonable minds" formulation in *Butler v. McKellar*, 494 U.S. 407, has already "eroded" the "force" of the *Penry* decision. That argument, however, is entirely unpersuasive. The CJLF asks the Court to believe that within a few months after the *Penry* case and without the slightest acknowledgement of what it was doing, this Court repudiated that decision *sub silentio* simply by using the "reasonable minds" phrase. That phrase is already carrying far too much baggage in this case; it scarcely can bear this weight as well.

Moreover, the "established practice" rule would sacrifice the objective this Court's "retroactivity" doctrine is meant to achieve in the name of administrative convenience. Once again, the purpose of *Teague* is to ensure that the state courts respect the federal legal principle prevailing at the time they determine a prisoner's claim. To do that, a federal habeas court must ascertain what that principle was and apply it to the prisoner's claim.

No one proposes that the federal court's task will always be easy; indeed, it will often be difficult.[20] Yet to suggest that this Court can artificially *make* the task easy by telling the federal habeas courts to defer to "established state practices" is to suggest that the effort be abandoned entirely. It might as easily be proposed that, in order to render "retroactivity" cases less burdensome,

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[20] *Cf. Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment)(noting that a federal court may have to devote significant "time and effort" to the task of determining the rule to be applied in federal court).

the federal courts should be instructed to conclude *either* that prisoners' claims never rest on "new rules" or that they always do.[21]

In truth, the "established practice" proposal advanced by the CJLF approaches the latter extreme. For when a state court denies relief on a federal claim, it may typically rely on a state precedent in support. It follows in most situations that the kind of "established practice" the CJLF has in mind could readily be demonstrated. CJLF Brief at 15 (suggesting that any practice "sanctioned for some significant period of time" would suffice).

Finally, the "established practice" rule would compound the error already threatened by Gilmore's extension of the "reasonable minds" dictum in *Butler*. The CJLF would not have a federal court examine such an "established practice" and decide even whether it reflects so much as a "reasonable" approximation of the federal constitutional standard that actually prevailed at the time a petitioner's conviction became final. That would defeat the CJLF's purpose to "improve" on the guidance that *Teague* and *Butler* provide by offering the federal courts a "bright line" to follow. Rather, the idea is simply to tell the federal courts that if they conclude that a

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[21] *Cf. Desist v. United States*, 394 U.S. at 268 (Harlan, J., dissenting) (emphasis added):

> It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at a time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the costs of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

state practice was "established," they must defer to a previous state court judgment resting on that practice.

The result of any such program would be grotesque. Gilmore suggests that the federal habeas courts should no longer determine whether previous state judgments were correct when rendered, but should accept as sufficient any state judgment that was not *unreasonable*. The CJLF proposes that the federal courts should cease being concerned even that a state judgment was *unreasonable*, but should ask only whether it was consistent with state practice. There is simply no way for the Court to accept that invitation without abandoning both principle and the Habeas Corpus Act.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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